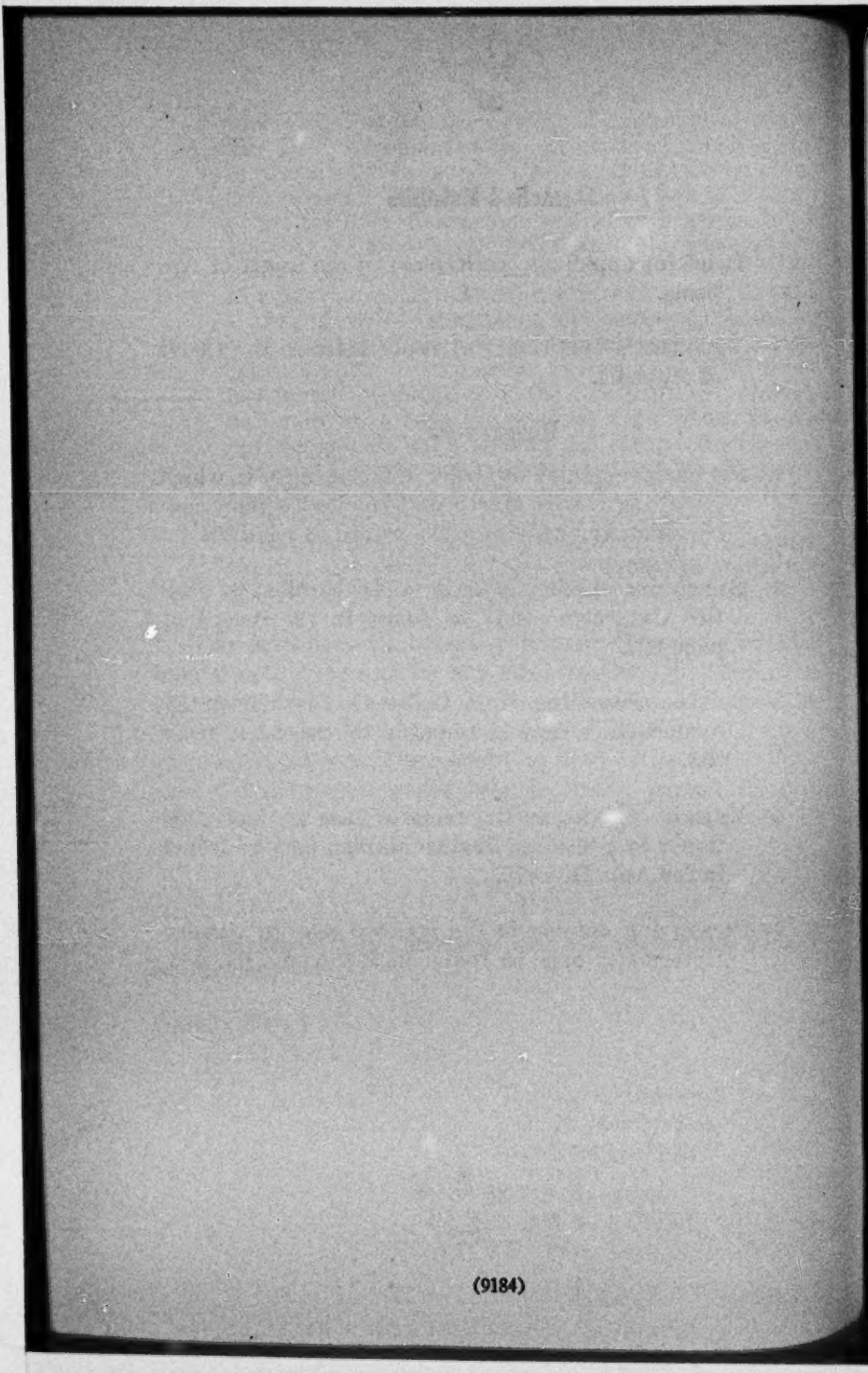

(37)

Supreme Court of the United States

October Term, 1944

No. 386

IN THE MATTER

of

HULON CAPSHAW, an Attorney,

Petitioner.

ANSWER AND BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

EINAR CHRYSTIE,
Attorney for Respondent,
The Association of the Bar of
The City of New York,
Office and Post Office Address,
43 West 43rd Street,
Borough of Manhattan,
City of New York.

CHESTER B. MCLAUGHLIN,
S. C. LEWIS,
Of Counsel.

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In the Matter

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HULON CAPSHAW, An Attorney,

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ANSWER AND BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

The Association of the Bar of the City of New York respectfully submits to this Court its answer to the petition for a writ of certiorari herein and its brief in opposition to the application.

The petitioner now seeks a review by this Court of the Court of Appeals' decision upon the ground that he has been denied due process of law under the 14th Amendment of the United States Constitution (Pet. Brief, p. 2).

The Disciplinary Proceeding Which Is the Only Proceeding This Court Is Asked to Review, Was In Every Respect Regular

The admission to and removal from the practice of law in the State of New York is placed by statute under the control of the Appellate Division of the Supreme Court of

the State of New York. (N. Y. Judiciary Law, Sections 88 and 476.) Pursuant to the statute and in conformity with the long established practice recognized by both the Appellate Division and the Court of Appeals of the State of New York, this proceeding was regularly commenced by the respondent upon a petition containing the charges of misconduct which was duly served upon the petitioner. The petitioner duly served and filed his answer in which he denied the charges of misconduct and asked the Court to send the matter to a Referee (R., fol. 52). The petition was duly submitted to the Appellate Division on notice to the petitioner and an Official Referee was appointed.

The matter was duly brought on for hearing before the referee and the petitioner appeared both in person and by counsel. The respondent introduced the evidence which it contended established the charges. No objections were taken to the evidence received against the petitioner. Indeed, none could have been. Respondent's evidence consisted only of the petitioner's own testimony given on other occasions with relation to the subject matter of the charges and the records of trials conducted before the petitioner as magistrate and which he had decided.

Petitioner took the stand in his own defense and was cross-examined and called such witnesses as he deemed material. These witnesses were however, exclusively character witnesses except that in the case of Judge McDonald he, in addition to character testimony, also gave some wholly negligible evidence of Magistrates' Court practice at a time which he could not fix (R., pp. 20-23). In addition to the character witnesses who testified the petitioner was permitted to file as many letters and affidavits as to character as he chose and these were printed in the record.

The case was closed before the Referee. No request was made on behalf of the petitioner to submit further evidence or reopen the proceeding. The Referee filed his report in which he expressly excluded from consideration any evidence not before him in the proceeding and found that upon the evidence before him the charges had been established (R., fol. 2067).

The Referee's report was duly filed and served together with a notice of a motion to confirm the same (R., fol. 2068). In due course the Appellate Division entered an order disbarring the petitioner and handed down three opinions which were united as to petitioner's guilt. The opinions, according to the practice of the Appellate Division, bear upon them the date of the original return date of the notice of motion to confirm the Referee's report, but were handed down at the same time as the order of disbarment (June 22, 1943). The majority opinion rested squarely upon the report of the Referee and concluded as follows:

> "The referee has reported that the charges are fully sustained by the evidence. This, in our judgment, is the only conclusion that could reasonably have been reached." (R., fol. 2076)

The petitioner thereupon took an appeal to the Court of Appeals. The authority of the Court of Appeals to review a disciplinary proceeding is limited to questions of law which include a review of the record for the purpose of determining whether there was evidence of guilt.

> *Matter of Zanger,* 266 N. Y. 165, 169, 174;
> *Matter of Kaufmann,* 245 N. Y. 423, 432;
> *Matter of Robinson,* 209 N. Y. 354, 356, 359;
> *Matter of Goodman,* 199 N. Y. 143, 144-5.

The matter was duly brought on for argument and was argued in the Court of Appeals. The Court of Appeals affirmed the order of disbarment without opinion.

Petitioner was represented throughout by able counsel. No question was raised as to the regularity of the disciplinary proceedings from the service of the papers by which they were instituted down to and including the decision of the Court of Appeals.

The petitioner asks this Court to entertain jurisdiction by joining in petitioner's *speculations* as to the grounds of the decision of the Court of Appeals which rendered no opinion and as to the grounds of the decision of the Appellate Division. Petitioner cites no authority in support of such a proposition. The authorities are all to the contrary. (*Infra*, Point III, p. 14.)

The petitioner's argument revolves around references in the Appellate Division's opinions in this case to a prior opinion in a separate proceeding against the same petitioner. The petitioner's contention is that the Court did not decide the case upon the evidence before it in the disciplinary proceeding and that it found him guilty of additional charges upon evidence with which he was not confronted. It is only necessary to read the Referee's report and the Appellate Division's opinion to realize that such was not the fact.

The majority opinion did not make the former opinion a part of the opinion in this case nor hold that it was bound by it. Had the Appellate Division considered that it was bound by its former decision it would not have referred the case to a Referee but would have decided it

upon the pleadings. That the court gave consideration to the additional evidence offered by the petitioner in the disciplinary proceeding is evidenced by the fact that it withheld its decision for nine months and then three opinions came down. In the opinion of only one of the Justices is it intimated that he felt bound by the former decision (R., fol. 2076). But even that opinion only means that since the Court had found that the petitioner's conduct had made him unfit to remain a magistrate, the same conduct made him unfit to be a member of the Bar and there is no intimation in Mr. Justice Untermyer's opinion and no reason to believe that he did not give consideration to the record in the present proceeding and any additional evidence adduced by the petitioner.

The majority opinion rests its conclusions squarely upon the evidence before the Referee in this proceeding and confirms his report in the following language:

> "The referee has reported that the charges are fully sustained by the evidence. This, in our judgment, is the only conclusion, that could reasonably have been reached." (R., fol. 2076)

The third opinion written by Mr. Justice Dore expressly states that the former proceeding "is not determinative." He too, found the petitioner guilty but disagreed as to the measure of discipline. This statement of Mr. Justice Dore does not imply that the majority opinion had considered it determinative although it may imply disagreement with Mr. Justice Untermyer's statement that he was "constrained" on the authority of the former decision to vote for disbarment.

The petitioner distorts and draws unjustifiable inferences from the statement in the majority opinion that "The facts involved are stated in detail" in the former opinion. Since in the former opinion the Appellate Division had analyzed at length and in detail the very same evidence which was received against the petitioner in the disciplinary proceeding, there was nothing unusual or improper in the Appellate Division making a passing reference to it, instead of re-analyzing it at length. By such reference it did not adopt the former opinion. By the majority opinion's very words, its reference to the prior opinion was limited to the "facts" and by the facts, it could only have reference to those established in the disciplinary proceeding.

The said prior opinion was not in evidence in this proceeding and the Court of Appeals had no occasion to pass upon anything therein stated in reaching its decision.

The petitioner apparently realizing the complete lack of merit in his contention seeks to support it by also asserting (Pet. Point III) that he was denied a fair hearing because the Appellate Division's opinion in the instant case stated that

> "The respondent offered no evidence beyond his own explanation of his conduct and testimony as to his character." (R., fols. 2075-6)

This statement is fully justified by an examination of the record itself. Other than his own testimony and that as to character, there was no evidence submitted by the petitioner on the hearing which could not properly be brushed aside as "no evidence" and it does not follow from such characterization that it was not considered. The only witness who testified to anything beyond character was Justice McDonald. He was called primarily as a character witness,

but was also questioned on the custom of magistrates in construing constructive possession in so-called policy cases. His testimony on the subject was of the most vague and inconclusive character and on cross-examination was shown to be worthless (R., pp. 20-23).

The petitioner makes another contention equally lacking in merit. At page 16 petitioner asserts error reviewable by this Court in that the Referee refused to permit the petitioner to testify as to advice given him by counsel that the two decisions forming the basis of the charges were correctly made, although this advice was given long after the decisions were made and the testimony was obviously hearsay. No objection or exception was taken to the Referee's ruling (R., fol. 109). Furthermore, the petitioner got around the Referee's ruling through a "character" letter which was filed and printed in the record in which the counsel referred to stated the advice which he had given the petitioner. (See paragraph 5 of Mr. Williams' affidavit, R., p. 683.) We make reference to this only to show the latitude that was allowed the petitioner and the lack of any basis for his alleged claim that he was "denied his day in court, notwithstanding the sham and pretense of a trial" (Pet. Brief, p. 17).

At page 24 the petitioner cites a number of cases to the effect that other decisions are not res adjudicata in a disciplinary proceeding. While the very decisions which he cites do not go as far as petitioner's statements concerning them, the matter is immaterial as there is no contention that the res adjudicata doctrine was applied in this case. The case was, as petitioner contends it should be "begun ab initio" and the evidence as petitioner concedes in his very Point II on page 23 of his brief, was competent.

The respondent denies the contentions of the petitioner.

The Association of the Bar of the City of New York, the respondent herein, respectfully contends:

1. An order of disbarment after a hearing upon notice to the accused attorney, does not violate any of his rights or privileges under the United States Constitution. It is final and will not be reviewed by this Court.

2. That the decisions of the State Courts of New York upon the facts including all questions as to the admissibility of evidence, are final and are not reviewable in this Court.

3. That this Court will not look outside of the record in search of a Federal question unless it appears that one was actually decided by the State Court.

BRIEF

POINT I

An order of disbarment after a hearing upon notice to the accused attorney, does not violate any of his rights or privileges under the United States Constitution. It is final and will not be reviewed by this Court.

That the disciplinary proceeding was conducted throughout in accordance with the law and practice of the State of New York has been demonstrated (*supra*, pp. 1-4). In *Ex parte Wall*, 107 U. S. 265, in which a disbarred attorney asserted due process of law had been violated and sought a writ of mandamus to have himself reinstated, the writ was refused. The Court stated at page 288:

> "* * * the action of the court in cases within its jurisdiction is due process of law."

It has been repeatedly held that the right to practice law is merely a privilege which may be withheld or withdrawn by the state through its proper authorities and that this Court will not review the State Court's decision.

In the *Matter of Seiling et al.*, v. *Radford*, reported in 243 U. S. 46, an application was made to have the respondent disbarred in the Supreme Court of the United States. The application was based upon a record showing that Radford had been disbarred by the Supreme Court of the State of Michigan. Chief Justice White in his opinion at page 50 states:

"In coming to solve that question three things are patent:

(a) That we have no authority to re-examine or reverse as a reviewing court the action of the Supreme Court of Michigan in disbarring a member of the bar of the courts of that state for personal and professional misconduct; * * *"

In Re Secombe, 19 How. 9, an application was made for a writ of mandamus directed to the Supreme Court of the Territory of Minnesota in which court the petitioner had been disbarred. He contended that he had been deprived of his property without due process of law. This court denied the application and in its opinion stated in part at p. 13:

"* * * it has been well settled by the rule and practice of common law courts that it rests exclusively with the court to determine who is qualified to become one of its officers as an attorney and counselor and for what cause he ought to be removed."

In *In Re Thatcher*, 190 Fed. 969, the attorney was disbarred by a District Court in Ohio. On appeal to the Circuit Court of Appeals the appeal was dismissed and the order affirmed (212 Fed. 801). On appeal to this Court the appeal was dismissed (241 U. S. 644). The opinion of the District Court reads in part, as follows:

"Early in the case the court found itself at variance with the respondent and his counsel touching the nature of the office of attorney at this bar and of the proceedings in disbarment. We wholly disagree with respondent that the right to practice law is a property right, to be treated with all the incidents peculiar to property. On the other hand, we hold

> that it is merely an extraordinary privilege, valuable to the holder, it is true, and granted to him for life on certain conditions, upon the reasonable maintenance of which by him depends his continuance in office." (190 Fed. 969, at p. 974)

In *Bradwell* v. *State of Illinois*, 16 Wall. 130, this Court affirmed an order entered by the Supreme Court of Illinois which refused to admit the attorney to practice. The Court's opinion reads in part, as follows:

> "We agree with him (counsel) that there are privileges and immunities belonging to citizens of the United States in that relation and character and that it is these and these alone, which a state is forbidden to abridge. But the right to admission to practice in the courts of a state is not one of them." (at p. 139)

A proceeding entitled *In re Lockwood*, reported in 154 U. S. 116, was an application for a writ of mandamus requiring the Supreme Court of Virginia to admit the applicant (a woman) to the bar of that state. The petitioner claimed that she had been denied a privilege or immunity belonging to her as a citizen of the United States in contravention of Article IV of the Federal Constitution and of the 14th Amendment thereof. This Court declined to review the decision of the Supreme Court of Virginia or its construction of the statutes of that state governing the admissions of persons to its bar and the application was denied.

See also:

Randall v. *Brigham*, 7 Wall. 523, 540-1;
Matter of Rouss, 221 N. Y. 81 and 667; writ of certiorari denied 246 U. S. 661.

POINT II

The decisions of the State Courts of New York upon the facts including all questions as to the admissibility of evidence are final and are not reviewable in this Court.

In *Kennard* v. *Louisiana*, 92 U. S. 480, Kennard, a former associate justice of the Supreme Court of Louisiana, asserted that he had been removed from office without due process of law. This Court, in affirming the state court's action stated:

> "The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the State courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all." (at p. 481)

In *Waters-Pierce Oil Co.* v. *State of Texas*, 212 U. S. 86, the opinion of this Court reads in part (p. 97):

> "The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the state court and denied by the rulings and judgment of that court. Sec. 709, Rev. Stat. U. S. Nor does this court sit to review the findings of fact made in the state court, but accepts the findings of the court of the

> State upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court. (Citing *Quimby* v. *Boyd*, 128 U. S. 488; *Egan* v. *Hart*, 165 U. S. 188; *Dower* v. *Richards*, 151 U. S. 658; *Thayer* v. *Spratt*, 189 U. S. 346.)"

In *Barrington* v. *Missouri*, 205 U. S. 483, the plaintiff in error appealed from a judgment of conviction in a criminal case and claimed that he had been compelled to give testimony against himself in violation of his rights under the Federal Constitution. Chief Justice Fuller in his opinion said (p. 486):

> "The State Supreme Court held that the Trial Court in admitting the testimony did not commit error. This, notwithstanding, the Constitution of Missouri provided 'that no person shall be compelled to testify against himself in a criminal case.' Its ruling upon that proposition is not subject to review in this Court."

In the case of *West* v. *Louisiana*, 194 U. S. 258, the plaintiff in error appealed from the decision of the Supreme Court of the State of Louisiana affirming his conviction of the crime of larceny in the lower Court. Mr. Justice Peckham who wrote the opinion of this Court said (p. 260):

> "The only question for this court to determine is whether the admission of the deposition of Thebaud as evidence upon the trial of this case deprived the plaintiffs in error of due process of law, and therefore was a violation of the Fourteenth Amendment upon the part of the State through its judicial department."

And at page 261:

> "We are now asked to review the decisions of the state court as to what is the law of that State regarding this question of evidence, because as asserted the State has ever since 1805 made the common law, as it existed at that time, the rule as to evidence on criminal trials, and it is contended that the common law did not permit this evidence under circumstances existing in this case, and the state court in permitting the deposition to be read not only violated the state law, but the Fourteenth Amendment, by refusing to the plaintiffs in error due process of law.
>
> Whether the state court erred in its construction of the state constitution and statutes and the common law on the subject of reading depositions of witnesses, is not a Federal question. We are bound by the construction which the state court gives to its own constitution and statutes and to the law which may obtain in the State, under circumstances such as those existing herein. Among many of the cases to that effect see *Brown* v. *New Jersey*, 175 U. S. 172."

POINT III

This Court will not look outside of the record in search of a federal question unless it appears that one was actually decided by the State Court.

In *Citizens' Bank* v. *Board of Liquidation*, 98 U. S. 140, this Court in dismissing an application for a writ of mandamus for want of jurisdiction, concluded its opinion as follows (p. 142):

> "No Federal question having been specially raised by the pleadings, and the record showing clearly on

its face that the decision of such a question was not necessarily involved, we will not go through the opinion of the court, even in Louisiana, to ascertain whether one was in fact decided.

* * *

We have often since that case reaffirmed the old rule. *Moore* v. *Mississippi*, 21 Wall. 636; *Brown* v. *Atwell, Administrator*, 92 U. S. 327. In the last case, citing numerous authorities, we say, 'We have often decided that it is not enough to give us jurisdiction over the judgments of the State courts for a record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it actually was decided, or that the judgment as rendered could not have been given without deciding it.' "

In *Cuyahoga River Power Co.* v. *Northern Realty Co. et al.*, 244 U. S. 300, this Court in dismissing a writ of error for want of jurisdiction, concluded its opinion as follows (p. 304):

"But assuming that we are not controlled by the statement of the Supreme Court of Ohio on this subject and must determine it upon our own conception as to what was done by the court whose judgment is under review, the result would be the same. We so conclude because looked at from the point of view of the action of the trial court and of the Court of Appeals, the case presents the single question of what principle is to be applied where from an absence of an opinion expressed by the court below it is impossible to say whether its judgment was rested upon state questions adequate to sustain it independent of the federal questions or upon such federal questions, both being in the case. But the rule

which controls such a situation has long prevailed and was clearly expressed in *Allen* v. *Arguimbau*, 198 U. S. 149, 154-155, where a writ of error to the Supreme Court of Florida was dismissed, as follows:

> 'The Supreme Court of Florida gave no opinion, and, therefore, we are left to conjecture as to the grounds on which the pleas were held to be bad, but if the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, this court will not take jurisdiction. *Dibble* v. *Bellingham Bay Land Company*, 163 U. S. 63; *Klinger* v. *Missouri*, 13 Wall. 257; *Johnson* v. *Risk*, 137 U. S. 300'. *Bachtel Wilson*, 204 U. S. 36; *Adams* v. *Russell*, 229 U. S. 353."

In *Otis* v. *Oregon Steamship Company*, 116 U. S. 548, in dismissing a writ of error, the opinion stated in following the rule in *Moore* v. *Mississippi*, 21 Wall. 636 (p. 550):

> "That rule governs this case. There is not in the record the least suggestion of a Federal question. We will not look into the opinion, therefore, which has been annexed to the record below, in obedience to our Rule No. 8, section 2, to ascertain whether such a question was in fact decided."

As long ago as 1827 Chief Justice Marshall stated that even unsound reasoning by the Court should not prevent the affirmance of a judgment if the judgment were correct. The opinion reads in part, as follows (p. 120):

> "If the judgment should be correct, although the reasoning by which the mind of the Judge was con-

ducted to it, should be deemed unsound, that judgment would certainly be affirmed in the Superior Court." (*Williams* v. *Norris,* 12 Wheat. 117, at p. 120)

That the instant case was correctly decided has been established by the affirmance by the Court of Appeals.

The evidence in the disciplinary proceeding and law applicable thereto.

While we realize that this Court will not pass upon the evidence in the disciplinary proceeding, in view of the fact that the petitioner has annexed as exhibits to his brief copies of his brief and reply brief in the Court of Appeals, we feel it incumbent upon us to give our views as to the evidence and law applicable thereto as we stated them in our brief in the Court of Appeals.

Under the Authorities the Evidence in the Disciplinary Proceeding Was Ample to Establish the Allegations of the Petition

Before discussing the evidence itself we call attention to the authorities applicable thereto.

The duty imposed by law on all City Magistrates with respect to the conduct of examinations of defendants who have been arrested and charged with crime is set forth in Sections 207 and 208 of the Code of Criminal Procedure. Section 207 provides that "if it appear, either that a crime has not been committed, or that there is no sufficient cause to believe the defendant guilty thereof, the magistrate must order the defendant to be discharged * * *."

Section 208 provides:

> "If, however, it appear from the examination that a crime has been committed and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must, in like manner, indorse on the depositions and statement, an order, signed by him, to the following effect: 'It appearing to me by the within depositions (and statement, if any) that the crime therein mentioned (or any other crime according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer the same.'"

In the *Klein* and *Silverstein* cases the duty of the petitioner to hold the defendants for trial was entirely clear and there was, in fact, no basis for holding the prima facie proofs insufficient in either case. In wilful disregard of these proofs the petitioner ignored his duty to hold the defendants and arbitrarily discharged them. His consciousness of guilt is plainly inferable from the nature of his attempts to persuade the Hines jury that he honestly disposed of the cases in the strict performance of judicial duty.

A similar situation was dealt with by the Appellate Division, First Department in the *Matter of the Investigation of Magistrate Silbermann*, in which Hon. Samuel Seabury recommended the removal of Magistrate Silbermann on the grounds, among others:

> "III. That in the trial of a series of shoplifting cases, all originating in the Klein store, Magistrate Silbermann's decisions were rendered, not upon the evidence, but upon considerations outside of the

record; that in the Felder case his attitude and conduct were unjudicial and unfair; and that in the Hanasty case he attempted to change the original records of the court in a material respect, and gave untrue testimony before me with relation thereto.

IV. That Magistrate Silbermann's decision in the Isaacson and Schneider case was governed by considerations outside of the record."

The Appellate Division unanimously found the Magistrate guilty of the foregoing charges and directed his removal from office. The Court stated:

"In the Felder case, comprised in Charge No. 3, we find that the evidence discloses that there was probable cause to believe that the defendant was guilty of the crime, and that the respondent, in wilful disregard of this prima facie proof, arbitrarily and with apparent bias refused to hold the defendant for trial. The hearings as conducted by the respondent disclosed an unfair attitude towards the complainant and his witnesses and unjudicial conduct on respondent's part, and indicates that he was actuated by improper motives.

The Hanasty case, likewise comprised in Charge No. 3, presents another instance of unfair and unjudicial conduct.

Charge No. 4 is established. The respondent, with proof that the defendants had previously been convicted of pocketpicking on several occasions, arbitrarily dismissed the charge, when he knew that upon the proof before him the defendants should have been convicted."

Judge Finch's opinion in the *Silbermann* case does not seem to be reported in the official reports but is printed on

the front page of the New York Law Journal on July 3, 1931.

The findings of the Appellate Division that Magistrate Silbermann's discharge of the defendant in the *Felder* case was actuated by improper motives were based solely upon his conduct at the proceedings and his failure to hold the defendant who, upon the evidence, was plainly guilty of the offense charged.

The findings of the Court and the Referee with respect to the petitioner's disposition of the *Klein* and *Silverstein* cases are based in part upon the proceedings had before the petitioner in the two cases involved. A study of those proceedings, which are discussed hereinafter, carries conviction that petitioner, with his experience, ability and evident attention to the matters before him, could have had no doubt that upon the evidence presented the defendants in each of the cases should have been held for trial at Special Sessions. In the *Silverstein* case, bias is apparent from the petitioner's conduct and disposition of the case. In neither of the cases could his discharge of the defendants have been the result of rational though mistaken judgment, and since he was fully possessed of his senses, cognizant of his duties and experienced in the law, it must be inferred that his action was influenced by considerations outside of the record. The records of these proceedings standing alone, are sufficient to establish the allegations of the petition with respect to the disposition of these two cases. See *Silbermann* case, *supra*.

The allegations of the petition with reference to the *Klein* and *Silverstein* cases are also supported by inferences necessarily to be drawn from the testimony which

petitioner gave at the Hines trial when called as a witness to explain his disposition of the *Klein* and *Silverstein* cases. The petitioner's testimony was replete with misstatements of the evidence, false characterizations of the testimony and erroneous statements of law, his answers upon cross-examination were extremely evasive and equivocal, and the reasons which he advanced to support his decisions were palpably groundless. The nature of this testimony is such that it not only discredits the explanations which the petitioner advanced for his judicial acts but in and of itself creates a controlling inference of improper motivation.

People v. *Willett*, 213 N. Y. 368, 386;
People v. *Conroy*, 97 N. Y. 62, 80;
People v. *Birnbaum*, 208 App. Div. 476 (1st Dept.);
Coleman v. *People*, 58 N. Y. 556;
Wilson v. *United States*, 162 U. S. 613.

In *People* v. *Willett, supra*, the defendant was convicted of requesting and accepting a nomination for Justice of the Supreme Court for which he promised to pay and did pay a valuable consideration to political leaders instrumental in procuring his nomination. Shortly after his nomination, a newspaper editorial charged that a large sum of money had been used in procuring the nomination of three candidates for Justices of the Supreme Court. Thereupon, these nominees prosecuted the publisher of the newspaper for criminal libel and for this purpose each made an affidavit proclaiming his innocence of the charge. This prosecution was withdrawn when it was discovered that the publisher had evidence that one of the candidates had borrowed $10,000 from a bank and that the officers of the bank would be called to testify. Each of the nominees then published a statement in the newspaper setting forth his financial

contributions to secure election, the defendant's statement being partial, misleading and not wholly true. The newspaper editorial, the affidavit made by the three nominees and the statements which each of them published were introduced in evidence against the defendant. The Court of Appeals held that these documents were properly introduced, not as evidence of the facts contained therein, but "to determine in connection with the other evidence whether the defendant by concealing information, and by partial statements, equivocation, and by untruthfulness, evidenced consciousness of guilt." The Court stated the general rule to be (p. 386):

> "When a person is publicly accused of crime, or is accused by formal criminal proceedings, a guilty consciousness may always be inferred from falsehood, misrepresentation, evasion, equivocation or by suppression of the facts in regard to the same."

See also:

People v. *Conroy, supra;*
People v. *Birnbaum, supra.*

In *Coleman* v. *People, supra,* the Court of Appeals, in affirming the conviction of the defendant for receiving bars of pig iron knowing them to have been stolen, stated (p. 561):

> "* * * If unsatisfactory, or fabricated and false statements were made by him in accounting for the possession of, and mode of storing and dealing with, the iron found in his possession; if false statements were made by him as to the person from, or for whom, or purposes for which he bought such iron, it would be a strong circumstance for the prosecution, as showing a consciousness of wrong, tending

to show *mala fides* and a knowledge by the accused of the manner in which his patrons and clients acquired the property."

Similarly, in *Wilson* v. *United States, supra,* the United States Supreme Court stated (pp. 620-621):

> "Nor can there be any question that if the jury were satisfied from the evidence that false statements in the case were made by the defendant, or on his behalf, at his instigation, they had the right not only to take such statements into consideration in connection with all the other circumstances of the case in determining whether or not defendant's conduct had been satisfactorily explained by him upon the theory of his innocence, but also to regard false statements in explanation or defense made or procured to be made as in themselves tending to show guilt. The destruction, suppression or fabrication of evidence undoubtedly gives rise to a presumption of guilt to be dealt with by the jury. 1 Greenl. §37; 3 Id. §34; *Commonwealth* v. *Webster,* 5 Cush. 295."

This well-settled doctrine has its obvious application to the present proceeding. When called as a witness in the *Hines* case the petitioner was confronted with the charge of the District Attorney set forth in the bill of particulars that he had been improperly influenced in the disposition of policy cases and with the testimony of the witnesses Weinberg and Davis in support of this charge which specifically related to the *Klein* and *Silverstein* cases. In attempting to answer this charge, he denied that his decisions in these cases had been improperly influenced in any way and attempted to explain his decisions on other

grounds. The petitioner's explanations could not be accepted because they were palpably incredible and untrue, and an inference of conscious guilt arose in support of the charge that his discharge of the defendants in disregard of the evidence must have been influenced by considerations outside of the record.

The persuasiveness of this inference can only be appreciated by reading the petitioner's testimony without abridgement.

The petitioner's testimony at the Hines trial not only supported the charges of improper conduct in the disposition of the *Klein* and *Silverstein* cases, but it also furnished, in and of itself, a third ground for disciplinary action. His attempt to obstruct the administration of justice by deceiving and misleading the jury as to the evidence presented and the law which should have been applied in the *Klein* and *Silverstein* cases, and as to his real reasons for discharging the defendants in each of these cases was compelling cause not only for his removal from the Bench, but from the Bar as well. Such testimony establishes "delinquency affecting general character and fitness for office". (*Matter of Kane, etc.* v. *Rudich,* 256 App. Div. 586.) Rudich was also a City Magistrate and was removed from the Bench by the decision just cited. He was subsequently disbarred upon charges including those in the removal proceeding. (*Matter of Rudich,* 256 App. Div. 670.)

Where a witness testifies as to his own mental operations, it may be difficult to prove falsity and conscious evasion and equivocation, but in such case, patent falsehoods, preposterous explanations, and misstatements and

distortions of fact are considered sufficient proof of contemptuous obstruction of justice.

People v. *Doody*, 172 N. Y. 165, 173;
Matter of Finkel v. *McCook*, 247 App. Div. 57 (1st Dept.);
United States v. *McGovern*, 60 F. (2nd) 880, 890 (C. C. A. 2nd);
In re Michaels, 194 F. 552;
In re Schulman, 177 F. 191, 193.

A reading of the petitioner's testimony leaves the unavoidable conviction that the two decisions were influenced by considerations outside of the record and that the testimony before the Hines jury was false and designed to mislead.

The Evidence

The evidence submitted by the respondent upon the instant proceeding was the same as was submitted by the Referee in the removal proceedings before the Appellate Division and consisted of fifteen complaints in *People* v. *Klein, et al.* (Pet. Exs. 4 to 4N incl.), the complaint in *People* v. *Silverstein* (Pet. Ex. 6), the testimony taken before the petitioner as Magistrate in both the *Klein* and *Silverstein* cases (Pet. Ex. 3 [235-348]*; Pet. Ex. 5 [364-467]), the petitioner's testimony in *People* v. *Hines* (Pet. Ex. 7 [472-1634]) and the minutes of eight other hearings in the Magistrates' Court before the petitioner in which defendants were held upon charges of a similar offense as those charged in the *Klein* and *Silverstein* cases, that of being in possession of policy slips. The statute alleged to have been violated in all cases was Section 974 of

* NOTE: Beginning with this page all references are to folios of the Record.

the Penal Law. The respondent also put in evidence the transcript of the testimony of the petitioner taken in the removal proceeding before the Appellate Division on December 19, 1939 (Pet. Ex. 9 [1636-1815]).

The petitioner offered no evidence beyond his own statement and several character witnesses and character letters. One of the character witnesses, however, former Chief City Magistrate McDonald, was also called for the purpose of showing that after the *Silverstein* case (May 6, 1933), the Magistrates' Courts had adopted more liberal rulings in construing constructive possession, in holding defendants in policy slip cases. His testimony, however, proved nothing of the sort. Indeed, he seemed to be under the impression that the rule had been made more strict. On direct examination, to be sure, he testified in part as follows:

> "Q. Isn't it a fact, though, that some time later the Magistrates' Courts and the Courts of Special Sessions no longer held to the rule of strictissimi juris and were *more liberal* in their holdings? A. Yes.
>
> Q. When did that take place? A. That took place, undoubtedly from 1933 on" (65).

but on cross-examination when he was asked upon what he fixed the date of 1933, he answered:

> "Well, I think it was around about that time that a change in the—maybe a court decision, maybe in the rendering of some opinion that it came about that a *stricter construction* of the law should be given by the Magistrate" (66-67).

His cross-examination continued in part, as follows:

> "Q. You do not recall any particular decision? A. No.

Q. And when you say 1933, that is more or less of a guess, isn't it? A. Right.

Q. Wasn't it really the Hines case that prompted stricter rulings? A. Probably'' (67).

The statute alleged to have been violated in the *Klein* and *Silverstein* cases, Penal Law Section 974, reads as follows:

> ''Keeping of place for game of policy. A person who keeps, occupies or uses, or permits to be kept, occupied or used, a place, building, room, table, establishment or apparatus for policy playing or for the sale of what are commonly called 'lottery policies', or who delivers or receives money or other valuable consideration in playing policy, or in aiding in the playing thereof, or for what is commonly called a 'lottery policy', or for any writing, or document in the nature of a bet, wager, or insurance upon the drawing or selection, or the drawn or selected numbers of any public or private lottery; or who shall have in his possession, knowingly, any writing, paper or document, representing or being a record of any chance, share or interest in numbers sold, drawn or selected, or to be drawn or selected, or in what is commonly called 'policy', or in the nature of a bet, wager or insurance, upon the drawing or selection, or the drawn or selected numbers of any public or private lottery; or any paper, print, writing, number, device, policy slip, or article of any kind such as is commonly used in carrying on, promoting or playing the game commonly called 'policy'; or who is the owner, agent, superintendent, janitor or caretaker of any place, building, or room where policy playing or the sale of what are commonly called 'lottery policies' is carried on with his knowledge or after notification that the premises are

so used, permits such use to be continued, or who aids, assists, or abets in any manner, in any of the offenses, acts or matters herein named, is a common gambler, and guilty of a misdemeanor."

The Klein Case

The petitioner testified in the disciplinary proceeding that one, Weinberg, had testified in the first Hines trial to overhearing a conversation between the petitioner and Hines to the effect that an important policy case was coming up before the petitioner as Magistrate in which one of the defendants was named Klein, and that Hines was very much interested in it, and that the petitioner had told him that he had never disappointed him before (111-112). On the second Hines trial Weinberg's testimony had been read to the petitioner for the purpose of obtaining his denial (500-503).

The Klein case involved fifteen defendants (257-258) who were arrested in an apartment at 500 West 144th Street, New York City, on November 22nd, 1932, charged with a violation of Section 974 of the Penal Law in that they had in their possession certain policy slips. All of the defendants were arraigned for hearing before the petitioner in the Magistrates' Court, Twelfth District, Borough of Manhattan, on December 9, 1932 (Pet. Exs. 4 to 4N incl. [235-240]). The three police officers who entered the apartment and participated in making the arrests testified before the appellant (241; 265; 297). Under the statute the only questions for the petitioner to determine were (1) was there a violation of Section 974 of the Penal Law, and (2) had sufficient been shown to cause him to believe that the de-

fendants arraigned before him were guilty and to justify holding them to answer the charge.

One of the arresting officers, Patrolman James Canavan, testified as follows:

> "Q. You were both in civilian dress at the time? A. Yes. We then announced ourselves as police officers. We walked inside and the defendant Klein grabbed me by the coat. He said, 'Where do you come from, a division?' I said, 'No, sir, from downtown.' He said, 'Are you going to make a pinch?' I said, 'Yes'. He said, 'Can't we do something about this?' I said, 'About what?' He said, 'You have one of the biggest banks in Harlem.'
>
> I then proceeded inside the room. I seen these defendants. I saw seven adding machines. I seen about 100 policy slips. We then started to take the names and question the defendants" (267-268).

The record further discloses that seven of the defendants were standing at adding machines and alongside of each machine was a little tray holding policy slips (243-249). The arresting officer took the names of the operators of the machines (252; 268) and placed in a separate marked envelope the slips found alongside the operators (333-336). Other defendants were seated at a long table (243; 257) and one of the arresting officers testified he saw long sheets of paper on the table used for tabulating and a number of policy slips (243).

Police Officer Canavan also testified that one of the defendants, Tessie Ware, stated that the defendants Blum and Klein were the bosses. It was also obvious that Klein was in charge of the establishment from the fact that the woman who answered the door when the policemen called would

not let them in until Klein came to the door (242-243; 266-267). At the time the defendant, Tessie Ware, made the statement about Klein and Blum she was about four feet from them (294-295). This same officer also testified that later the defendant Klein approached another officer in the presence of the witness and said, "Is there any chance to look at those sheets? We have to know how much we have to pay out on the hit numbers" (271).

The major portion of the policy slips found in the apartment were contained in three locked pouches. Police Officer Canavan testified that two of the pouches had been cut open and before the third pouch was cut the defendant Klein said: "Don't cut that strip. Here is a key to the lock" (269).

Police Officer Magnus, the complainant against Klein and the other defendants testified as follows:

> "• • • I questioned each of the defendants how long they are working there and they all answered different times.
>
> Q. They all answered what? A. The length of time they worked there. I asked the defendant George Klein what he was doing there. He said he was—he came there to fix the machines. I also asked the defendant Blum. He answered the same way.
>
> I asked him 'Where are the machines you fixed?' They would not answer. I said, 'Where are the tools that you had to fix these machines with?' They would not answer. I asked the other 13 defendants if they saw the defendants Klein and Blum fix any machines here, and they would not answer" (243-244).

Police Sergeant Thomas W. Gray testified:

"A. • • • As I looked around I seen that girl then—

By the Court:

Q. Who is that? A. This girl here (pointing).

One of the defendants: Jean Valdez.

A. (Continuing) I found her in a clothes closet. She had a lot of clothes wrapped around her. I asked her what she was doing there. She said, 'I thought I would get away with it' " (302).

Notwithstanding the fact that there were fifteen persons employed in this place, that there were seven adding machines (301), more than two hundred thousand policy slips (246), tabulating sheets (243), stamp pads, date stamps and other paraphernalia (301) required to operate a large gambling establishment of this kind, and that the defendant Klein himself characterized the enterprise as "• • • one of the biggest banks in Harlem", and that each of the defendants had a key to the apartment, nevertheless the petitioner discharged all of the defendants.

The evidence presented by the police officers was more than sufficient to sustain a conviction of illegal possession of policy slips in violation of Section 974 of the Penal Law. *People* v. *Ellis*, 243 App. Div. 522 (1st Dept.), aff'd without opinion 266 N. Y. 664; *People* v. *Anes*, 218 App. Div. 833 (1st Dept.); *People* v. *Kelly*, 248 App. Div. 566 (1st Dept.); *People* v. *Horowitz*, 248 App. Div. 584 (1st Dept.); compare *People* v. *Birnbaum*, 208 App. Div. 476 (1st Dept.); *People* v. *Amberg*, 216 App. Div. 791 (1st Dept.); *People* v. *Bellucci*, 136 Misc. 174.

The petitioner in his brief refers to *People* v. *Adams*, 85 App. Div. 300; aff'd 176 N. Y. 351, as the controlling decision on constructive possession, but we fail wholly to follow his reasoning that the *Adams* case did not require him to hold Klein and Silverstein. Klein produced and gave to the officers the key to a locked pouch containing thousands of policy slips. Silverstein alone in an automobile while he was being pursued by the police, threw out a package containing policy slips. What stronger evidence of constructive possession could be asked for?

While sitting as a City Magistrate the petitioner had in many cases both before and after the *Klein* case, held defendants for Special Sessions upon evidence no stronger and in some cases far weaker than that presented in the *Klein* case. (See Pet. Exs. 10 to 17 incl., Record pp. 606-667.)

Petitioner's Testimony on the Hines Trial as to the Klein Case

When called as a witness in the *Hines* case, the petitioner, after stating his conception of the duties of a committing Magistrate (529-530; 537-538; 540-541), undertook to tell the jury what happened in the *Klein* case (547-556; 570-655). He advanced the contention that none of the defendants was shown to be in possession of policy slips (570-571; 655-664), but his statement of the testimony was inadequate in that he failed to state that seven of the male defendants were interrupted in the act of tabulating policy slips on individual tabulating machines, that six of these men were positively identified, and that each of the four women were engaged in similar work, being seated with

three men at a table with tabulating sheets and policy slips immediately in front of them. The testimony showed that all of the defendants except Klein were in fact engaged in tabulating policy slips under their individual and immediate control. Notwithstanding this material omission he testified:

> "• • • I had to determine what the facts were there with reference to every one of these defendants. • • • I can't emphasize too much, gentlemen, the importance of where these men were and what they were doing. Whether they had possession of these policy slips, or not, that's what the court had to determine, and the position of these men was very material on the question of constructive possession, because every officer admitted that not a single one of these defendants had these slips in their actual possession. So the position of these men, these defendants, was most material to show what constructive possession, whether they had exclusive domination of any sort over these slips or not. And yet on that very material question, here these officers are different" (619-620; 621-622).

Having thus omitted from his own statement the facts which he regarded as the most material circumstances in the case, he nevertheless said "there was nothing in this testimony to show what work they did there. And I tried in every way possible, by repeated questions to each one of these officers to get what the facts were" (598). Ignoring the testimony which should have controlled his decision, he attempted to mislead the jury by a false analogy illustrated by a hypothetical case which he put to the jury, of narcotic cigarettes found in the jury box, for the possession of which on one of the jurors could be convicted because

of the absence of proof showing who dropped the package (534-535). That the analogy was false he virtually admitted on cross-examination (1450-1459).

As appears from the record of the Klein hearing, the petitioner apparently believed the testimony as far as it went and gave as the only reason for his decision the failure of the officers to present sufficient evidence. In attempting to explain his decision when testifying in the *Hines* case, however, the petitioner relied not only upon the alleged insufficiency of the evidence but also, and to a much greater extent, upon what he asserted to be the incredibility of the officers who testified in the *Klein* case. He characterized them as unworthy of belief and attempted to support this characterization by groundless assertions unsupported by the record of their testimony.

Thus he asserted that the officers differed as to what the defendants were doing when the officers entered the two connected rooms (614-624; 640-644). The officers having entered these rooms at different times there was no contradiction, and to make out any appearance of conflict in their testimony it was necessary to eliminate or to shorten the time intervals between their entrances. This the witness did by testifying, contrary to the record, that Magnus and Canavan entered these rooms together (615) and that Gray came in only five minutes later (615; 645). The record shows that when Klein opened the front door of the apartment Magnus immediately entered and went down a long hall to the rooms in the rear, while Klein engaged Canavan in conversation at the entrance (243; 267; 273-274). Magnus described what he saw the defendants doing when he entered the rear rooms which opened into each

other (243; 257-261). Canavan, after finishing his conversation with Klein, proceeded down the hallway and gave his description of what he saw at the time he entered the room (267-268; 274-278). Gray did not arrive until eight or ten minutes later (285), and testified that he saw no policy slips on the table or near the machines (301). The witnesses differed in their statements of what they observed because their observations were made at different times. The petitioner's assertion that their testimony was conflicting was without foundation, and his own misstatements of the testimony were perfectly designed to give credence to this groundless assertion.

The petitioner's other reasons for his assertion that the officers were unworthy of belief were equally groundless. In his direct examination he repeatedly complained of their testimony that the defendants stated that they "worked there" (555-556; 589; 597-598; 603; 630; 651). He admitted that there was no dispute that such statements were made, but complained that the officers did not explain what they meant by such statements (1465-1467). Confronted with the fact that he was criticizing the officers because they did not testify that the defendants admitted something which they did not say, he asserted that the reason he did not believe them was because they asked the defendants if they worked there and did not ask additional questions (1471-1473), and in this connection complained that the officers did not ask the defendants whether they handled the slips (1472-1476). He was compelled to admit that this was groundless because the record disclosed that Magnus had asked each defendant if they had handled the slips (1477-1478).

He asserted that although the defendants admitted they worked in the premises, there was nothing to show what work they did there (603-608; 653), whereas the testimony was that they admitted they worked for a bank and were paid weekly wages in cash left on the table in envelopes (249-250; 253-254; 282; 292; 299; 304; 309-310). The work which was interrupted was the tabulation of hundreds of thousands of policy slips. If this was a bank, as the defendants admitted, it was certainly a policy bank, and the appellant could have had no doubt of that fact. He asserted, however, that he didn't know what a policy bank was (1446) and suggested that this could not have been a bank because "There was no testimony of any money there, or any records of collections, or disbursements, or anything of that sort, which I assumed that there would be matters of record of handling in a bank" (1446).

The petitioner asserted before the jury: "The testimony didn't show that they (the defendants) were working there in the handling, or having anything to do with the policy slips" (1530-1531). In support of this assertion he told the jury three times on direct examination that some of them might have been cooks or waiters, or have come there for a social visit (556; 598; 604-605), but when pressed on cross-examination, said: "I did not say I thought that. I said that was a possibility" (1532).

Another reason which he asserted as a ground for his disbelief was that the officers did not ask the defendants whether they owned the slips (581-583; 1480-1481). The record disclosed that Magnus had asked each of the defendants if the slips were theirs, and that Canavan had asked each of them whose slips they were (262; 281). Thus

confronted with the record, he gave the following answer to the following question:

> "Q. It appears now that Canavan asked the question you said they were disbelieved because they did not ask? A. He did not say anything about ownership. He said whose they were, which would be a little different" (1491).

The petitioner had just previously testified that he did not think that each of the people who assorted slips had to own them in order to be held for possession (1483-1484), and that he did not mean that an officer, to prove possession, had to prove that the man owned them (1484).

He said he gravely doubted Gray's credibility because Gray testified that the slips were no longer on the machines when he arrived (644-645; 1456-1458), but did not ask Magnus to explain what had happened before Gray's arrival when Magnus was recalled to the stand (1549; 1553), and he could not explain his failure to do so.

He criticized Canavan and said he did not believe his testimony about Klein's offer of bribe because Canavan did not confront Klein with his inconsistency when Klein later asserted that he had come to fix the adding machines (553-554; 1560-1561; 1572-1573). His second asserted reason for not believing Canavan's testimony about the proffer of bribe was that Canavan "didn't disclose to Magnus or to Gray • • • that an offer of bribe had been made to him" (554) and that when "Gray came into this court he knew nothing about this offer of bribe, he testified nothing to it about" (554; 1572-1578).

In this connection the Judge presiding at the Hines trial asked the petitioner the following questions and received the following answers:

"The Court: You thought that Gray ought to have told you what Canavan told him about what the defendant told Canavan; is that it?

The Witness: Sir, may I have that read? (Record read.)

The Witness: Yes.

The Court: That is hearsay, isn't it? It would have been a hearsay statement. If the defendant's counsel had objected to it it would not have been admissible, would it?

The Witness: I think it would have been part of the res gestae, your Honor, of what occurred right at the time and on the scene.

Q. You mean it would have been part of the res gestae, what one of his subordinate officers told him? A. No, what the defendant said when he was there accused of a crime" (1574-1575).

And further:

"Q. You say because Gray did not give you hearsay testimony that Canavan was a liar? A. I said that was a consideration in the case in determining the credibility of the testimony" (1576).

The petitioner repeatedly characterized the testimony of the officers as contradictory, ridiculous, non-responsive and evasive (595-6; 598-9; 603-4; 625-7; 631-7; 655-6). Such characterization was utterly groundless, as is disclosed by the record of the trial before the petitioner. Finally, he said he thought Sergeant Gray was unworthy of belief because he did not search the woman who was found hiding in the closet (646-7; 1579-81).

We regard it as significant in connection with the petitioner's wanton attempt in the course of his testimony

on the Hines trial, to discredit the police officers who had testified in the *Klein* case, that he had admitted repeatedly that he had and has no independent recollection of the case and that all he knows about it is what he has learned from reading the record and from, as he described it, "reading between the lines" (143).

Among the petitioner's many admissions that he had no independent recollection of the *Klein* case outside of what he read in the record was the following:

> "Q. And have you now or have you had at any time in the past hereto, any independent knowledge or recollection of a case before you at that time known as People v. Klein and others? A. No, except from having examined the minutes. I have an acquaintance with the questions that I asked, and with the fact that a case of that sort was before me; but I have no independent recollection of the case whatever" (1640).

He made similar statements with relation to the *Silverstein* case and confirmed these statements before the Referee in this proceeding (142-3). When he got on the stand to testify in the *Hines* case, with no personal recollection of the incidents outside of what the record showed and having nothing in the record upon which to lay a foundation for distrusting the witnesses, he proceeded to deliberately base his distrust upon his *observations* and the *attitude* of the witnesses, concededly not shown in the record. Among the phrases which he used were:

> *"I observed this witness before me. I did not have this record to look at * * * but he showed that he had assumed an attitude. I was observing the*

*manner of this witness * * * how he acted on the witness stand * * *"*

and that the record

> *" does not show the attitude of the witness and his manner of testifying and his actions on the witness stand"* (967-8).

We regard it also of the utmost significance that in the course of the Klein trial, in questioning the witnesses, the appellant appeared to regard *ownership* as of importance although he reluctantly admitted on the Hines trial that he knew ownership was not a necessary element of the crime (1483-4).

The petitioner at the conclusion of the Klein trial, so far from intimating that the police officers had testified untruthfully, gave the impression that the police officers had made an honest effort to obtain the evidence. He there stated in deciding to dismiss the case:

> "It seems to me that the officers tried to find out whose they were but I do not think they have" (347).

In the case of *Donovan* v. *Armstrong*, in which the appellant a few months before the *Klein* case had held the defendant for Special Sessions, the evidence of constructive possession was trifling as compared with that in the *Klein* case. The only witness against the defendant was a police officer. The officer had entered a "speakeasy" owned by the defendant. The defendant was seated at a table eight or nine feet away from the counter. The officer searched the premises and found some policy slips on the bartender who was standing behind the counter. There was a cash register at the back of the counter which the officer opened

by pushing down one of the keys. In the cash register he found one policy slip. The defendant denied knowing anything about it and testified that not only the bartender, but another man on the premises who prepared food for the customers, had access to the cash register. The defendant's testimony was uncontradicted yet the petitioner denied a motion to dismiss the charge and stated that he thought the cash register raised a presumption even though other people had access to it, and that the burden was on the defendant to show how the policy slip came to be in the cash register (1834-5; 1853).

The Silverstein Case

In the *Silverstein* case the defendant was arrested on May 5, 1933, charged with possession of policy clips. He was arraigned in the Magistrates' Court, Twelfth District, Borough of Manhattan, before the petitioner on May 6, 1933. The record (364-467) disclosed that the arresting officers had received information that policy slips would be picked up at 419 West 148th Street and they parked their car where they could view the premises. After they had been waiting ten or fifteen minutes the defendant drove up to the house in a fast automobile. A colored man immediately ran down the steps of the house and handed the defendant a package wrapped in blue paper. The defendant drove off in his automobile at a high rate of speed and turned north at Convent Avenue. Followed by the officers, the defendant proceeded up Convent Avenue to 150th Street, turned west on that street to Amsterdam Avenue and then north on Amsterdam Avenue to 151st Street. There both cars were stopped by a traffic light with the officers' car separated from the defendant's car by one or two automo-

biles and blocked on the west by a surface car. One of the officers got out of the police car and ran to the defendant's car, but as he was about to place his hand on the door of the defendant's car the light changed and defendant started off again (131-2).

Patrolman McCarthy, who was driving the police car, testified that he followed the defendant's car north on Amsterdam Avenue to 153rd Street where the defendant made a very sharp turn (372). His testimony with respect to subsequent events is as follows:

> "As he turned the corner of 153rd Street he threw this package out and continued on about 35 or 40 feet and the car stopped and I pulled alongside of him. I asked the defendant why he threw the bundle out. I held him there until my partner came around the corner. I told my partner to pick up that package. He brought the package over to me. I asked him did he know what is in it; he said no. I continued the search of the car and found nothing.
>
> *By the District Attorney*:
>
> Q. Officer, did you investigate to find out what is inside that package? A. I did.
>
> Q. And what did you find inside the package? A. It contained policy slips" (374-5).

The officers positively identified the color of the package found in the street to be the same as that which was handed to the defendant in front of the 148th Street house (386).

It appears that out of a total of 304 questions addressed to the police officers, the petitioner asked 197, defendant's counsel, 80 and the District Attorney, 27. The petitioner, without any other basis, than what we contend was his

preconceived purpose to dismiss the case, sought to belittle and confuse the officers, and to develop a plausible explanation for his conduct, he examined officer Jones with a view to casting suspicion upon the arrest as one prearranged between the officers and the defendant. The petitioner's examination of Jones was in part, as follows:

"Q. And was it necessary to chase this fellow all that distance and give him a chance to throw out anything he might have? A. It was.

Q. Before you could get him stopped? A. It was. This defendant had a very fast car and we couldn't catch him.

Q. Did you expect to happen just what did happen? A. No, sir, I did not.

Q. Do you know this defendant? A. I never saw him before.

Q. Do you know anybody that knows him? A. No, I do not.

Q. Did he know that you were a policeman, that you were chasing him? A. I don't think he did.

Q. Did you ask him about that? A. No, sir, I did not.

Q. Did he seem surprised or anything when you came up? A. I arrived there about four or five minutes after Patrolman McCarthy had this defendant on the street.

Q. Did he look surprised or did he look like he knew about what was going to happen? A. No, he was just standing there.

Q. Do you think he was tipped off that you fellows would give him a little chase and would have all this parade before the court? A. No, sir.

Q. You don't think so? A. No, sir.

Q. You don't think the same persons that tipped you off tipped him off too? A. No, sir.

Q. That you would be there and give a little chase down the street? A. No, sir.

Q. What makes you say that? A. If this defendant knew that we were going to be there he certainly would not have taken the package.

Defendant's Counsel: Now, I ask that be stricken from the record.

Q. Why do you say that—this is in the nature of an investigation, I want to find out what the truth is. Why do you say that? A. Well, this defendant, the way he came up there, took this package and then drove away at this high rate of speed.

Q. Couldn't that be part of the scheme? A. It could have been part of the scheme but there is no scheme.

Q. You feel sure of that? A. I am positive.

Q. If there was any scheme that you don't know anything about? A. I don't think so.

Q. I mean you either do or you don't. A. There was no scheme that I know anything about" (404-8).

After evidencing an intention to discharge the defendant the petitioner addressed the following request to the defendant's attorney: "Would you mind having the defendant sworn and letting me ask him a question or two?" (464) Thereupon the following questions, among others, were addressed to the defendant:

"*By the Court*: * * *

Q. Did you arrange to show the exhibit before this court, to have all these police chase you or anything? A. No, sir, I didn't know anything, I didn't even know what was happening. They stopped me, asked for my license, searched the car, I didn't know what it was all about.

Q. Are these policy slips here yours? A. I don't know what a policy slip is, I never played one.

Q. Did you have them in the car with you? A. I did not.

Q. Did you throw them out in the street? A. I did not.

Q. Are you sure of that? A. Absolutely.

By the Defendant's Counsel:

Q. Were you ever convicted of a crime? A. Never.

By the Court:

Q. You swear none of these were ever in your possession? A. Never, at no time" (465-7).

The defendant having voluntarily taken the stand, the petitioner asked no denial of the specific testimony of the police officers, and defendant's counsel failed to ask any question of the defendant except whether he had been previously convicted. The petitioner asked none of the questions which he criticized one of the officers for failing to ask out of court when later called as a witness in the *Hines* case. In the language of his own criticism, he did not ask the defendant anything about the fact that he had an appointment to get the policy slips, who the man was that brought them down the steps, what was going on in these premises from which the slips were brought, or when and under what circumstances he made the appointment to be there and receive the slips. In fact, he simply asked the defendant to repeat under oath the denials which the officers testified he had made on the street. The defendant's general denials without contradiction or explanation of the circumstances narrated by the officers were of no probative effect. His examination of the defendant was limited to

matters tending to exonerate him and nothing was asked that might tend to establish his guilt.

The testimony of the officers had, of course, made a plain case requiring the appellant to hold the defendant. It is obvious that the reason the petitioner, on his own initiative, called the defendant to the stand was for the purpose of getting some basis, however, inadequate, for the disposition which he had from the outset, intended to make of the case.

The Petitioner's Testimony on the Hines Trial as to the Silverstein Case

The petitioner also attempted to justify his discharge of the defendant Silverstein by the statement that he did not believe the testimony of the two police officers.

Bearing in mind that the petitioner has on several occasions and again before this Referee asserted that he had no independent recollection of the *Klein* and *Silverstein* cases (142-143), his attempts on the Hines trial to discredit the witnesses in the *Silverstein* case establish, by the very language he used, the falsity of his testimony on the Hines trial in that connection. For example, the petitioner testified that his "doubt arose in the beginning of the testimony and continued throughout all the sentences of this police officer" (966), and again:

> "it arose from the manner of this witness testifying from the very beginning, where he said, the defendant,—on page 3 of the testimony: 'A colored man came running down the steps of that house; handed this defendant a package of the same color'. He starts right out" (961).

and again:

> "I observed the witness before me. I did not have this record to look at, to observe on that particular day, *but he showed that he had assumed an attitude. I was observing the manner of this witness testifying, how he acted on the witness stand before me*" (967-8).

and again, referring to the transcript of the testimony in the *Silverstein* case, he stated:

> "*This statement does not show the attitude of the witness and his manner of testifying and his actions on the witness stand. That I cannot reconstruct from the printed record*" (968).

How can this testimony be true if, as the appellant said again and again, he had no recollection of the case? In seeking to defend his decisions in the *Klein* and *Silverstein* cases, he characterized the police officers as untruthful, when he had no justifiable reason to doubt the truth of their statements. As to the first witness in the *Silverstein* case, McCarthy, he testified as follows:

> "Q. Do you mean that you distrusted McCarthy? A. I did.
>
> Q. Had you ever seen him before? A. I think I must have; yes, I must have.
>
> Q. Anything in your previous experience with McCarthy to lead you to distrust him? A. Well, I wouldn't know how to answer that, I had so many police officers.
>
> Q. I am asking you whether on this day you then had any doubt about McCarthy's integrity because of any previous experience; yes or no? A. I don't know.
>
> Q. You don't know? A. That is right.

Q. Is it not a fact that you held the defendant in a policy case on McCarthy's testimony just the day before? A. I probably did" (996-998).

* * *

"Q. The fact is you then held the defendant in $500 bail, didn't you? A. The record shows that, yes, sir.

Q. And the charge in that case was a possession of a grand total of 59 policy slips, wasn't it? A. I will have to look at the record. If you say so I will say yes.

* * *

Q. Isn't it a fact that you held the defendant for a grand total of 59 policy slips in $500 bail on the sole testimony of Officer McCarthy, Edward J. McCarthy? A. That was the usual bail.

Q. Now, do you suppose you could give me a responsive answer? A. I did.

Q. What is your answer, Yes? A. Yes" (1010-1012).

The implication in the foregoing testimony that he distrusted Officer McCarthy because he had seen him before was the most unwarranted slander. On the very day before the *Silverstein* case the petitioner had held for Special Sessions, a defendant named Viola Hart, for possessing policy slips upon the sole testimony of this same Officer McCarthy. In that case the officer had entered the grocery store owned by Mrs. Hart, had found a few policy slips under the counter and some more policy slips in the icebox. The defendant had told the officer that she knew nothing about the slips. The petitioner had asked the officer in that case whether anyone else stayed in the store and the officer told him that the defendant had said that her son did, and the officer stated that the son came into the store

while he was still there, but the officer did not ask him anything about the policy slips. No policy slips were found upon the defendant himself. Nevertheless the petitioner held the defendant in $500 bail for Special Sessions (1993-2000).

In the *Silverstein* case the petitioner professed to have a doubt as to the identity of the package of policy slips which was picked up on the street by one officer after the other officer had stated the package was thrown from the defendant's car. The petitioner professed to base his doubt upon two things: (1) that the officer had merely said that the package was thrown from the defendant's car without inserting the words that he had seen it thrown (717), although the officer was at that time in hot pursuit immediately in back of the defendant's car. Neither the Court nor anyone else asked the officer the specific question as to whether he had seen the package thrown (990-993). The other basis for the petitioner's professed doubts was that the officer used the expression that the package thrown was the same color as that which the officer had testified had been handed to the defendant in his car by a colored boy who came down the steps of the house before the chase commenced by the police (1112-1114; 760-762; 961). Upon the use of the expression "a package of the same color" the appellant would not allow the policy slips in evidence (386; 389). Of course it was wholly immaterial what package was handed by the colored boy into the car. The only important item of evidence necessary to have held the defendant was whether the package which was thrown from the defendant's car contained policy slips and on that point the testimony was as clear as it could possibly have

been (374-375). His cross-examination in that connection on the Hines trial was in part, as follows:

"Q. * * * You said, 'Now, it is significant that nowhere in this testimony does this officer say that he saw this package thrown out. He says it was thrown out as the defendant turned the corner. He claims the defendant was in a fast car and that he was only in a Ford car, slower, so that it does not appear he was present when the package was thrown out. He says he went on around the corner.' You gave that testimony yesterday, didn't you? A. I did.

* * *

Q. Isn't it clear that the proof is that—with the record before us, that the officer testified that this package was thrown out of the car by that defendant? A. The record does not show it.

Q. I will read it once more and drop it. 'As he turned the corner of 153rd Street * * *'——

Q. * * * 'he threw this package out and continued on about 35 or 40 feet, and the car stopped and I pulled alongside of him. I asked the defendant why he threw the bundle out? I held him there until my partner came around the corner. I told my partner to pick up that package. He brought the package over to me. * * *'

Q. Do you still say there was nothing in this record to show that the defendant threw the package out of the car? A. I certainly do. It seems it may have been a conclusion" (1116-1120).

When cross-examined with respect to his refusal to admit the policy slips in evidence, his answers were so evasive that Judge Nott, presiding at the *Hines* trial, interrogated the petitioner as follows:

"*By the Court*:

Q. Well, just before we adjourn, why did you refuse to admit them? A. Because, your Honor, I did not feel that the testimony before me had identified this package which was offered in evidence, as having ever been in the possession of this defendant.

Q. If it was in the car with him, it was in his possession, wasn't it? A. Yes.

Q. Was there any doubt, if the officer's testimony was true, that that was the package that was in the car? A. Yes, I thought there was considerable doubt.

Q. Why? A. Well, from the testimony of the officers saying 'of the same color'. He seemed to have a doubt about it himself.

Q. He testified there flew out of the car this package and he asked Jones to bring back this package and Jones brought back that package. A. Yes, but he had started off, your Honor please, by saying, 'A package of the same color', and he had indicated to me by that statement that he himself was in doubt about it being the same package.

Q. He said he saw a package come out of the car; he saw a package put in the car; he had Jones pick up that package. How could there be any doubt about it? A. Well, if Jones picked up that package, there could not be any doubt about it.

Q. Did you have any doubt that Jones picked up the package? A. I certainly did, yes.

Q. What package did you think he picked up? A. I don't know.

Q. Well, a package thrown from a house window or what? A. Possibly a different package that might have been thrown or placed by somebody else.

Q. Well, how could McCarthy tell him to go and pick it up then if it was thrown from a house? A.

McCarthy might have seen a package of the same color.

Q. Hurtling through the air from a window? A. He does not say he saw it thrown. He says it was thrown, and he may have seen it when he came up to the street, lying there, a package of the same color.

Q. That is, as he was driving by he saw a package of the same color lying on the street that somebody else threw? A. Possibly, yes, sir'' (978-982).

Referring to the discharge of the defendant in the *Silverstein* case, the petitioner told the jury in the Hines trial that the whole plan and pattern of the *Silverstein* case struck him as fantastic and most unbelievable, and on that ground he felt it was his duty to discharge the defendant (867). Although he had called the defendant as a witness he gave as a reason for dismissing the charge his suspicion that the defendant was a policy banker arranging for his own arrest to welsh on his bets (1326-28; 1339). That would not warrant the discharge of Silverstein in the face of the fact that there was proof that he had the policy slips in his possession.

The petitioner's testimony before the Referee in the instant proceeding did not furnish any more of an explanation for his conduct than that given in the removal proceeding which was none at all. Indeed, it made the situation worse in our opinion, for after making a show of frankness, the appellant reconsidered his position and the show of frankness went for nothing. Before the Referee herein, he testified in part, as follows:

"Q. Did you not over-emphasize some of the facts in connection with those cases, the Klein and Silver-

stein cases; did you not over-emphasize some of the points that you sought to make with relation to the policeman's testimony, with a view to indicating that they were not credible witnesses? A. In reading back over the minutes, I think that is true; yes, sir. But I certainly had no intention at that time of over-emphasizing anything unjustly or wrongfully.

Q. But you now feel that you did over-emphasize some things, do you? A. I think that is rather true; yes, sir.

Q. What do you have in mind? In the first place, what do you mean by 'over-emphasizing'? A. Well, I criticized statements of the police officers, and under the tension and atmosphere in which I was in, I would be asked by the District Attorney, 'Do you charge that the police perjured themselves?' And I would say 'Yes', when I think that if I had been under a cooler collar, I would have said, 'Well, I don't know that it was perjury. I think it was certainly suspicious and it may have been perjurious.' I think in that sense that I did over-emphasize to some extent my answers" (134-5).

When questioned more closely as to the particular portions of his testimony that he might have over-emphasized he stated he would have to "look at the record • • • and • • • have a little time to study that" (139-140). But at the adjourned hearing, when he said he had gone over the record he stated: "I do not believe there is anything that I would like to point out *at this time*" (222).

The only rational explanation of the disposition of the *Klein* and *Silverstein* cases is that the petitioner must have been influenced by considerations entirely outside the record and that in testifying as he did in the *Hines* case the peti-

tioner deliberately attempted to deceive and mislead the jury and to obstruct the administration of justice.

The question before the Court of Appeals was whether there was evidence of guilt to sustain the Appellate Division's order. The evidence in the case was ample to warrant the affirmance by the Court of Appeals.

CONCLUSION

There is nothing in the papers submitted by the petitioner to warrant this court in granting the relief prayed for.

The petitioner's application should be denied.

Respectfully submitted,

EINAR CHRYSTIE,
Attorney for Respondent,
The Association of The Bar of
The City of New York.

CHESTER B. MCLAUGHLIN,
S. C. LEWIS,
Of Counsel.